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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. JOSEPH MANUEL ALONZO, Defendant and Respondent.	E061356 (Super.Ct.Nos. CJR1400468 & FSB1102243) OPINION

APPEAL from the Superior Court of San Bernardino County. Charles M. Fuertsch, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Michael Ramos, District Attorney and Eric M. Ferguson and Audrey Berthelsen, Deputy District Attorneys for Plaintiff and Appellant.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Respondent.

During a hearing on a petition to revoke the community supervision on which defendant, Joseph Alonzo, had been placed, a hearing officer (Pen. Code, § 3455, subd.

(a))[1] in the trial court concluded that defendant's supervision had been terminated and the officer dismissed the petition.[2] The People appeal, contending this was error. We agree and reverse the order.

FACTS, ISSUES AND DISCUSSION

Defendant pled guilty to violating, inter alia, Vehicle Code section 10851 and was eventually sentenced to prison. On April 11, 2013, he was released on Community Supervision, which was set to terminate on November 18, 2014.[3] On April 14, 2014, his probation officer filed a petition to revoke his community supervision and remand him, recommending that defendant be incarcerated in the county jail for 180 days. In the petition, the probation officer stated that defendant had violated two of the terms of his community supervision by failing to report to the Probation Department within 48 hours of being released from custody on February 28, 2014. The petition also stated that defendant had served three prior 10-day flash incarcerations—two in 2013 and the one from which he was released on February 28, 2014.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The hearing officer did not orally discharge defendant from community supervision, although he noted that such supervision had already "been terminated by the length of time." However, the court minutes state that the hearing officer "order[ed] Community Supervision terminated" and the People's Notice of Appeal states that the hearing officer "discharge[ed defendant] entirely from . . . supervision."

[3] Section 3451, subdivision (a) provides that defendants who have served their prison terms be subject to community supervision "for a period not exceeding three years immediately following release."

At the April 15, 2014 hearing on the petition, defendant moved to have his community supervision terminated and the petition dismissed, on the basis that more than one year had elapsed since defendant's release on community supervision. Defense counsel "guessed" that defendant has signed a waiver during his latest flash incarceration, or, perhaps, during all three of his flash incarcerations. The People argued that defendant's flash incarceration in early 2014 meant that he could not take advantage of the methods available to terminate early community supervision. Specifically, they argued that a flash incarceration is a custodial sanction within the meaning of section 3456. That provision states, in pertinent part, "(a) The county agency responsible for [community] supervision . . . shall maintain [said] supervision over a person under [said] supervision . . . until one of the following events occurs: [¶] (1) The person has been subject to . . . supervision . . . for three years at which time the offender shall be immediately discharged from . . . supervision. [¶] Any person on . . . supervision for six consecutive months with no violations of his or her conditions of . . . supervision that result in a custodial sanction may be considered for immediate discharge by the supervising county. [¶] (3) *The person who has been on . . . supervision continuously for one year with no violation of his or her conditions of . . . supervision that result in a custodial sanction shall be discharged from supervision within 30 days.* [¶] (4) Jurisdiction over the person has been terminated by operation of law." (§ 3456, subd. (a), italics added.)

The hearing officer noted that he had already ruled on the issue presented, and that ruling is set forth in another unpublished opinion by this court. Specifically, as to the instant matter, the hearing officer said, "[T]he statutes do not allow for probation to extend the supervision out one year in a flash incarceration, and, . . . therefore, I'm going to rule that the extension of the supervision that was signed during the flash waiver is void. [¶] I'm going to dismiss the petition, and with that, the . . . [community supervision] has already been terminated by the length of time."

Although the People here contend that the hearing officer's ruling did not really address the issue, as framed by the parties below, which was whether defendant's latest flash incarceration was a custodial sanction within the meaning of section 3456, resulting in defendant not having been on supervision continuously for one year with no violation of his conditions of supervisions that resulted in a custodial sanction, reading between the lines of what the hearing officer said makes clear that he was rejecting the People's position and accepting defendant's. The People are correct that the hearing officer used incorrect terminology and cast his ruling inaccurately—in fact, defendant's community supervision, according to the petition, was set to expire on November 18, 2014, and for defendant's supervision to be considered terminated on April 15, 2014, defendant would have had to have been under community supervision continuously for one year with no violations of his conditions of supervision that resulted in a custodial sanction. Therefore, in order for the hearing officer's ruling to be correct, defendant would have had to have been on community supervision for one year from April 11, 2013, without a

violation of his conditions of supervision that resulted in a custodial sanction. The hearing officer was incorrect that community supervision had, *aside from the operation of section 3456, subdivision* (*a*)(*3*), "already been terminated by the length of time." In fact, termination of community supervision was not set to occur until more than seven months after the hearing.

We conclude that a flash incarceration is a custodial sanction within the meaning of section 3456. Section 3454, subdivision (b) categorizes a flash incarceration as an "immediate, structured, and intermediate sanction" that is "encouraged as one method of punishment for violations of an offender's condition of . . . supervision." Subdivision (c) goes on to explain, concerning flash incarcerations, "[s]horter, but if necessary more frequent, periods of detention for violations of an offender's . . . supervision conditions shall appropriately punish an offender while preventing the disruption in a work or home establishment that typically arises from longer term revocations." Section 3450, subdivision (b)(8) describes such intermediate sanctions as "[c]ommunity-based punishment" and "correctional sanctions." Section 3455 provides that if the intermediate sanctions provided in section 3454, subdivision (b), which include flash incarcerations, are not appropriate, the supervising agency may petition the court to revoke, modify or terminate community supervision. Upon a finding that the defendant violated the condition(s) of supervision, the revocation hearing officer may, inter alia, return him or her to community supervision with modifications of the conditions, including a period of incarceration in county jail, or revoke and terminate community supervision and order

him or her to be confined in the county jail. Subdivision (d) of section 3455 refers to these jail confinements as "custodial sanction[s]." Post-modification and post-revocation jail confinement serve the same purpose as flash incarcerations, therefore, there is no reason to consider the latter anything other than a custodial sanction. Certainly, there can be no doubt that a flash incarceration, like a post-modification or post-revocation incarceration, is a punishment and a sanction for a violation of the conditions of community supervision.

Defendant asserts that the hearing officer's ruling is not an appealable order. We disagree. The People may appeal "[a]n order made after judgment, affecting the substantial rights of the people." (§ 1238, subd. (a)(5).) Section 1238 goes on to provide, "Nothing contained in this section shall be construed to authorize an appeal from an order granting probation. Instead, the [p]eople may seek appellate review of any grant of probation, whether or not the court imposes sentence, by means of a petition for writ of mandate or prohibition . . . ." We agree with the People that releasing defendant from his obligations under the terms of his community supervision affects the substantial rights of the People.

Additionally, the People assert that termination of community supervision is akin to termination of parole, which is appealable. (*In re Wilson* (1981) 30 Cal.3d 438.) Defendant does not dispute the later point, but asserts that community supervision is not akin to parole because under section 3456, as stated above, an offender may petition a court to terminate his or her community supervision, but a court may not terminate

parole. (§ 3000, subd. (b)(6).) However, defendant fails to explain how this fact makes community supervision unlike parole for purposes of appealing a termination of the former. The fact that section 1238 specifically disallows appeals from a grant of probation is of little assistance, other than indicating that the Legislature intended that the People pursue complaints about grants of probation via a writ of mandate or prohibition, rather than an appeal.

Defendant asserts that his constitutional rights were violated by the procedures that resulted in his flash incarcerations. Section 3453, subdivision (q) provides, "[C]ommunity supervision shall include the following conditions: [¶] . . . [¶] (q) The person shall waive any right to a court hearing prior to the imposition of a period of 'flash incarceration' . . . ." However, aside from defense counsel's guess that defendant executed a not described waiver during the last or all of his flash incarcerations, the record before us contains no other information about the procedural protections surrounding them. Therefore, we have no basis upon which to address defendant's claim. Moreover, because defendant did not object to the petition to revoke his community supervision on this basis, he forfeited it. (*People v. Abilez* (2007) 41 Cal.4th 472, 521, fn. 12.)[4]

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[4] Below, all defense counsel said about the flash incarcerations were "I would ask the [hearing officer] to follow [his] previous position that a flash waiver is not a valid extension, that a flash with or without the waiver is considered an intermediate sanction, and thus, does not extend probation. [*sic*]" Counsel never asserted on what basis she considered defendant's flash waiver invalid. The companion case to this one, which resulted in an unpublished opinion, notes that the defendant there waived constitutional

[footnote continued on next page]

DISPOSITION

The order dismissing the petition is reversed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

KING
J.

[footnote continued from previous page]
challenges to the flash incarceration procedures and mentions no ruling by the same hearing officer as here on that topic (*People v. Cuadras*, E061367, filed 3/6/15) therefore, we assume that no such argument was made at the trial level in that case, either.